82-1131

No. 82-

Supreme Court, U.S.
FILED
JAN 4 1983
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KENNETH WILLIAM WHEAT,

Petitioner,

—against—

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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QUESTIONS PRESENTED

What safeguards are required by the Eighth and Fourteenth Amendments to the Constitution to ensure a reliable determination of a criminal defendant's ability to understand the proceedings against him and to assist in his defense in a capital case?

Whether petitioner's rights under the Eighth and Fourteenth Amendments not to be tried and sentenced to death while incompetent were violated where the trial court decided the question of his competency upon the basis of two brief colloquies with the petitioner in open court and without the benefit of any diagnosis or evaluation by a mental health professional or other information elucidating the nature and extent of petitioner's mental problems.

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OCTOBER TERM, 1982

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KENNETH WILLIAM WHEAT,

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v.

STATE OF MISSISSIPPI,

Respondent.

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Petition For Writ Of Certiorari To The Supreme Court of Mississippi

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OPINION BELOW

The original decision of the Supreme Court of Mississippi is reported as Wheat v. State, 420 So. 2d 229 (Miss. 1982). The opinion is appended to this petition as Appendix 1.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on October 6, 1982. On November 26, 1982, an order extending the time in which to file a petition for writ of certiorari to and including January 4, 1983, was issued by the Honorable Byron R. White, Associate Justice (Docket No. A-479). Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

2. This case also involves the following provisions of the statutes of Mississippi:

> §97-3-19. Homicide - murder defined-capital murder.
>
> * * *
>
> (2) The killing of a human being without authority of law by any means or in any manner shall be capital murder in the following cases:
>
> * * *
>
> (e) When done with or without any design to effect death, by any persons engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;
>
> §99-19-101. Jury to determine punishment in capital cases in separate

sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circum stances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury

shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

§99-13-11. Mental examination of person charged with felony--cost.

* * *

In any criminal action in the circuit court in which the mental condition of a person indicted for a felony is in question, the court or judge in vacation on motion duly made by the defendant, the district attorney or on the

> motion of the court or judge, may order such person to submit to a mental examination by a competent psychiatrist selected by the court to determine his ability to make a defense; provided, however, any cost or expense in connection with such mental examination shall be paid by the county in which such criminal action is pending.

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari from this Court to the Supreme Court of Mississippi to review a decision of that Court affirming his conviction of murder and sentence of death in the Circuit Court for Harrison County, Mississippi.

Petitioner, a 43-year-old male, was convicted of the murder of Joseph Mayer on January 8, 1980, following a jury trial. That same day, the jury sentenced him to death. R. at 807, 855-856.[1/]

1/ References to the record are as follows:

The events which led to petitioner's conviction began on Saturday, July 28, 1982. On that day, Joseph Mayer and Teresa Carol Hayes were married in Paducah, Kentucky. They left Kentucky in a 1976 Cutlass automobile with Kentucky licence plates, intending to go to the Mississippi gulf coast. By the next day, they reached Gulfport, Mississippi, from which they telephoned their parents. They were seen on Sunday night eating at a local restaurant in Gulfport. R. at 52-58, 77-78,

---

1/ continued

(a) transcript of the trial proceedings as, "R";

(b) transcript of pre-trial hearings and other matters ordered by the Supreme Court of Mississippi to supplement the record as, "R. Supp."

92-94. They were not seen again until their bodies were discovered in a wooded area in Gulfport on Tuesday, July 31, 1979. Their hands and feet were tied behind them and each had been shot in the back of the head. R. at 408-427, 547.

Shortly after the discovery of the bodies was made public, four people, a husband, wife and two sons,[2/] who lived near where the bodies were found, contacted the sheriff's office. They reported that on the Sunday prior to the discovery of the bodies, July 29, 1979, about midnight, a man came to their home and stated that his car had run off the road. Eventually, the husband and two sons drove with the man to where the car had fallen into a ditch. With the use of shovels and a tractor, they freed the car, which was a Cutlass automo-

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2/ The witnesses were Mr. and Mrs. Algie Netto and Garry Walker and Eugene Walker.

bile with Kentucky license plates similar to the Mayer's car, and changed one of its tires. After the automobile had been dislodged, they went back to the house where the driver got a drink of water. Each estimated that they were with the driver for about one and one-half hours. R. at 98-116, 243-254, 333-342, 392-395.

Based on the description given by these witnesses, a composite drawing of the driver was developed and circulated. When the composite was seen by a sheriff of nearby Pearl River County, he reported that it resembled petitioner, who was reared in the county but who had been away for a number of years,[3/] only to return in March, 1979 - four months before the murders. R. at 582-587.

3/ Petitioner had been incarcerated in the New Jersey State Prison from 1962 until 1979, after his conviction for second-degree murder.

While investigating petitioner's whereabouts, authorities learned from his relatives that he had left the area and apparently gone to Florida about the same time of the murders. R. at 596-607, 614-626, 636-656. He had given no forwarding address.

When petitioner discovered from telephone calls to his relatives in Mississippi that he was being investigated for the murders of the Mayers, he mailed a postcard to the mayor of Gulfport, Mississippi, with a picture of several women sunbathing on the front of the following written on the back:

> "Mayor
> Gulfport
> Mississippi
>
> I hear that your [sic] looking
> for me-Ask the CIA - They know.
> So does the Secret Service.
>
> Kenneth Wheat."

R. at 682, 722-724.

Two and one-half months later, on October 19, 1979, petitioner was arrested in Orlando, Florida. When arrested he initially gave his name as "Otis Cox" from Los Angeles, a name appearing on a social security card that he had. Eventually he told the police his real name and that he was wanted in Mississippi for murder. Later he was returned to Mississippi to stand trial. R. at 758-763.

There were two trials arising from the incident. In December, 1979, petitioner was tried and convicted for the murder of Mrs. Mayer. In that case the State sought the death penalty; however, when the jury could not agree on an appropriate sentence, a sentence of life was imposed pursuant to state law. See, Wheat v. State, 420 So. 2d 229, 230 (Miss. 1982). The trial of the case sub judice began on January 14, 1980.

Prior to both trials on November 15, 1979, petitioner's attorney filed in each case a "Motion for Mental Examination," requesting that petitioner be examined by a psychiatrist to determine whether he was competent to stand trial pursuant to Mississippi Code Annotated, Section 99-13-11 (1972). Within the text of the motion, trial counsel informed the court that:

> The Defendant's Counsel has attempted to ascertain facts of the situation surrounding the allegation of the above-mentioned crimes, but has been unable to do so. Defendant is unable to relate such facts, was unable to understand the nature of the charges against him, and is unable to assist counsel in the defense of his case.

R. at 9-9a (App. 2). The State submitted no written opposition to the request. A hearing on the motion was held on November 28, 1979. Before the hearing got underway, counsel stated that he had been instructed by petitioner to ask "that I withdraw the

motion for mental examination and (petitioner) has advised that he would not voluntarily in any event undergo such an examination." R. Supp. at 32-35. Based on petitioner's request, counsel asked that the motion be withdrawn. Thereafter, the court asked three perfunctory questions of petitioner: whether he knew that the motion had been filed; whether he understood that counsel was requesting that the motion be withdrawn; and whether he agreed to the request. Petitioner responded in the affirmative to each; and the motion was allowed to be withdrawn. Id.

The next day, while incarcerated, petitioner sent a handwritten note to the warden of the Harrison County Jail, where he was incarcerated, which read as follows:

> Notify my lawyer and the Sheriff that I want to plead guilty to the Mayer murder

charges tomorrow and I want to be sentenced next week.

/s/

Kenneth Wheat
12/29/79

R. at 712. On the same day petitioner delivered another handwritten not to the warden styled "Press Release", which read as follows:

"Press Release
November 19, 1979

Kenneth Wheat
Harrison County
Gulfport, Mississippi

I am completely innocent of the Mayer murders. In order to spare myself and my family the needless suffering of a lynch mob trial, which I'll only end in a gas chamber verdict, I've decided to plead guilty and I will not appeal. The FBI and Sheriff Hobbs have falsified evidence, pressured witnesses into lying and have fed news media a bunch of lies to make me look like a kill crazy monster. In Orlando the FBI told me they would force Harrison county to drop murder charges if I plead guilty to Federal Judge Wood's murder and they will make sure I get a good sentence.

> They've pressured two uncles in Miami to try to destroy my alibi for Woods murder. My christian faith and my clear conscience will give me the strength I need to endure forthcoming sufferings.

R. at 718.

The next day on November 30, 1979, the State through the prosecutor filed in both cases a "Motion for Mental Examination" (Appendix 3). The motion recited the fact that petitioner had previously filed his own motion for such an examination (which was later withdrawn) and made the court aware of the two handwritten notes. It also recounted the fact that when petitioner was arrested in Florida he gave an interview to the Orlando Sentinel Star newspaper, the contents of which were described as a "farfetched story and . . . [was] the product of a person that is not rational." The motion concluded that "[d]ue to the erratic behavior of the

defendant by his statements, the State of Mississippi feels that an examination is in order." R. at 44-45. A hearing on the State's motion was held on November 30, 1979.

During the hearing on the State's request for a examination, further representations were made by the prosecutor to the court concerning petitioner's irrational behavior:

* * *

> Also if your Honor please, attached to the motion is a copy of the article that we have to assume is true that was published in the Florida Sentier [sic], Orlando Senetier [sic] where this defendant alleges that the FBI set him up. He claims the trial of solving the murder of the late President John Kennedy; and that he was so close on the case that someone set him up in Mississippi to prevent him from uncovering what he allegedly had gathered through a private investigation that he began in March of 1978 when he was payrolled [sic] from the Georgia State Penitentiary.

R. Supp. at 117-118. The prosecutor observed that previously in connection with a New Jersey conviction for a minor offense, it was recommended that petitioner receive psychiatric treatment; and that while he was incarcerated in New Jersey for the murder of one of his relatives, he took hostage a prison psychiatrist who was attempting to treat or examine him. Id. The prosecutor made clear that he was filing the motion in order to "protect the interest of the State." R. Supp. at 119.

Petitioner's counsel objected to the motion apparently because of the petitioner's previous instructions that no such motion should be filed on his behalf. In response to questions from the Court, counsel admitted that there had been some "problems" in communicating with petitioner which he declined to describe because of

the attorney-client privilege; however, counsel opined that he did not think the "problems" were the result of a lack of mental capacity. R. Supp. at 120-123.

Thereafter, the court asked some questions of petitioner during which petitioner responded that he thought he was presently sane and that if the court ordered an examination he would remain silent. When asked if he had ever been treated by a psychiatrist, petitioner responded:

> "Most people who go to prison for a long time require psychiatric help because prisons are snake pits in New Jersey. It's a big insane asylum you know, and . . .
>
> * * *
>
> Yes, Sir. But I'm saying it's not uncommon for a prison or prisoner in Trenton State Prison to be under psychiatric care. The majority of inmates are. And a lot of times they may try to get themselves sent to the State Hospital because it's a lot bet-

> ter place than Trenton Prison. You've got more privileges, so inmates try to play crazy to get sent there, not because they are crazy.

R. Supp. at 125-126. When asked if he ever received a "report" from any psychiatrist petitioner responded that "they keep everything a secret." Id. Finally, when directly asked if he ever was advised to receive psychiatric treatment, he responded:

> They say everybody in prison is crazy. All inmates are crazy. If they weren't crazy, they wouldn't be in prison. That's the way they think, you know? Sane people stay free; and crazy people wind up in prison, you know? I don't think I need any treatment right now. I'm fully prepared to go to trial and communicate with my lawyer.

R. Supp. at 126.

Based on his limited in-court responses, the court concluded that the petitioner was "ration[al], able to communicate with his attorney, [and] has expressed a desire to stand trial." Con-

cerning petitioner's apparently delusional remarks that he was set up on the murder charges because of his personal investigation into the assassination of President Kennedy, the court stated that it was not going to inquire into the reasons for making such statements because it "assumed" that petitioner had a good "motive." The court refused to order a psychiatric examination, expressing its belief that to attempt an examination would be a "waste of time." Petitioner proceeded to the trial for the separate charge of the murder of Mrs. Mayer. R. Supp. at 127-128.

During the course of the first trial, a third motion to have petitioner examined by a psychiatrist was made. On December 7, 1979 after the conclusion of the guilt-innocence phase of the first trial but before the capital sentencing hearing, a written "Motion for a Mental Examination"

was filed by counsel for petitioner. R. Supp. at 47 (Appendix 4). In the motion counsel made clear that the motion was being filed over the objection of petitioner. However, the motion recited:

* * *

> That the Attorney of Record because of statements by the Defendant, and notes kept and made by the Defendant and because of past medical history of the Defendant, is of the opinion that the Defendant is not competent to stand trial at the present time nor could he have been sane at the time he allegedly committed the offense for which he is charged.

* * *

R. Supp. at 47.

A hearing was held the same day during which counsel further indicated that petitioner refused to present any "defense" during the sentencing hearing and that he only wanted to read a short statement, the contents of which were not disclosed.

After consultation with his attorney in open court, petitioner eventually agreed to undergo a psychiatric examination. R. Supp. at 107. However, the court overruled the motion for an immediate examination and proceeded with the capital sentencing hearing with the understanding that any verdict by the jury would be subject to the findings of the post-trial examination. R. Supp. at 111. A sentence of life was imposed and four days later, on December 11, 1979, the examination was ordered by the court. R. Supp. at 57. That examination was never fully conducted or completed.

What occurred after the court entered an order for the post-trial examination was explained on December 20, 1979, during a hearing on petitioner's motion for a new trial after the conviction in his first case. There, counsel explained that petitioner did not want to undergo an

examination, nor did he want to appeal his case. R. Supp. at 18. Petitioner explained that:

> I've been under a lot of pressure to submit to a Psychiatric Examination by a lot of people. And, uh, I definitely don't want to be examined and that's sort of the story.

R. Supp. at 11. Later, petitioner reaffirmed his desire not to appeal the case.

Less than one month later, on January 14, 1980, the trial in the case sub judice began. No examination by a qualified psychologist or psychiatrist was ever administered to petitioner during either trial.

At the trial in the second case, the primary evidence against petitioner consisted of the four persons who identified him as the driver of the automobile which had driven off the road near where the bodies were found, and the postcard and

writings of petitioner indicating his previous desire to plead guilty to the murders. At the conclusion of the evidence, petitioner was found guilty. R. at 807.

A capital sentencing hearing was conducted after which the jury imposed a sentence of death finding the following aggravating circumstances: (1) the murder being committed during the course of the crime of Robbery, i.e., the car belonging to Joseph Mayer; (2) the murder being committed in an especially heinous, atrocious or cruel manner, in that the victim was: bound hands and feet by his own clothing, shot in the back of the head by direct contact, abandoned in a secluded area; (3) the defendant, according to legal documents presented was previously convicted of three felonies: murder (to second degree) dated June 1, 1982, assault

with offensive weapon and false imprisonment dated February 27, 1975, capital murder dated December 7, 1979. R. at 855-856.

HOW THE FEDERAL QUESTION WAS PRESENTED AND DECIDED BELOW

As discussed in the Statement of Facts, supra, several requests were made before trial to have petitioner examined by a psychiatrist. Petitioner's enumeration of Error No. 1 in the Supreme Court of Mississippi asserted that the trial court erred when it failed to require petitioner to undergo a psychiatric examination. Wheat v. State, 420 So. 2d 229, 232 (Miss. 1982). Petitioner's counsel below failed to assert the Constitutional implications of the trial court's failure to order a competency examination. However, as will be demonstrated in the following section of this brief, the Mississippi courts were

required by the due process clause of the Fourteenth Amendment to make a sufficient inquiry into petitioner's competency to stand trial once information before the court raised a substantial question of his competency.

REASONS FOR GRANTING THE WRIT

For the reasons which follow, this Court should issue a writ of certiorari to review the decision of the Mississippi Supreme Court.

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI TO DECIDE WHAT SAFEGUARDS ARE REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO ENSURE A RELIABLE DETERMINATION OF A DEFENDANT'S COMPETENCY TO STAND TRIAL IN A CAPITAL CASE.

Despite information before the trial court which made it abundantly clear that there was a substantial question as to petitioner's competency to understand the proceedings and assist in his defense and

repeated request by both the prosecutor and defense counsel to order a psychiatric examination, the trial court failed to conduct an adequate inquiry into and make a reasoned determination of petitioner's competency to stand trial.

The facts before the court which raised a question of petitioner's competency can be summarized as follows:

1. other courts had previously recommended that petitioner receive psychiatric treatment and he had received such treatment while incarcerated in New Jersey after his conviction for second degree murder in 1962, R. Supp. at 119;

2. during his incarceration in New Jersey petitioner had held hostage a prison psychiatrist who was attempting to treat or examine him, R. Supp. at 119;

3. before his arrest in this case petitioner had notified the Mississippi authorities that the "CIA" and the "Secret Service" knew where he was, R. at 682, 722-724;

4. after his arrest in Florida petitioner stated in a newspaper interview that he was being set up by the FBI for the murders in Mississippi because he was so close to solving the assassination of President Kennedy, R. Supp. at 117-118;

5. without notice to his attorney he submitted in writing his desire to plead guilty to the murders, despite protestation of innocence, because, as indicated in his "press release," the FBI was attempting to set him up for the murder of Federal District Judge Woods, R. at 44-45, 712, 718;

6. trial counsel submitted two written motions describing bizarre behavior on the part of petitioner; that the first motion was withdrawn at the direction of petitioner and the second was filed over his objection, R. at 9-9(a), R. Supp. at 475;

7. the State of Mississippi, through the prosecutor requested that a psychiatric examination be administered due to the "irratic" behavior of the petitioner, R. at 44-45;

8. petitioner's repeated objections to speak to any psychiatrist and his attempts to downplay any past psychological problems by assert-

> ing that "everyone" in prison was crazy. R. Supp. at 11, 18, 126-127.

Despite this evidence of irrational behavior, the trial court limited its inquiry to a few cursory questions and, thereafter succumbed to petitioner's wish that he not be examined by a psychiatrist. The trial court did not even deem it necessary to ask about the most bizarre explanation that petitioner was being set up for the murders because he was close to solving the Kennedy assassination or would not admit to the murder of Judge Woods - deciding it was not appropriate to inquire into the "motive" of the petitioner to make such a claim.

On appeal, the Mississippi Supreme Court rejected petitioner's assertion that he should not have been tried until there was an adequate resolution of the question of his competency, finding that any error

was created by petitioner "alone" by his refusal to voluntarily submit to a psychiatric examination. Wheat v. State, supra. In doing so, the Mississippi Supreme Court departed from the decisions of this Court other state courts and federal courts of appeal requiring trial courts to make an independent evaluation of a defendant's competency. Therefore, this court should grant a writ of certiorari to review the decision of the Mississippi Supreme Court and determine what level of inquiry into competency of a defendant is required by the Eighth and Fourteenth Amendments in a death penalty case where there is evidence of bizarre behavior on the part of the accused, who professes a desire not to undergo any psychiatric examination.

The central inquiry of a determination of a defendant's competency is:

> Whether . . . [the defendant] . . . has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.

Dusky v. United States, 362 U.S. 402 (1960). Although this test originated under federal criminal statutes, it is beyond question that it is also constitutionally required whenever competency of a criminal defendant is questioned in a state proceeding as well. Drope v. Missouri, 420 U.S. 162, 172, 179-181 (1975). For this Court has made it clear that "the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of due process right to a fair trial." Drope v. Missouri, supra at 172. Citing Pate v. Robinson, 383 U.S. 375, 378 (1966). See also, Bishop v. United States, 350 U.S. 961 (1956) reversing 96 U.S. App.

D.C. 117, 120, 223 F.2d 582, 585 (1955). Adequate procedures must be utilized once information before the trial court raises a question of competency.

> The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient.

Drope v. Missouri, supra, at 180. Once a question is raised, a state court must conduct an evidentiary hearing and make a reasoned determination regarding competency in order to meet its constitutional obligations. Thus in both Drope and Robinson, this Court although finding that state statutory schemes "jealously guarded" the defendant's right not to be tried while incompetent, reversed convictions because of the failure of the trial courts to

utilize adequate procedures once a question of a defendant's competency had been raised. In Robinson, this Court found that a history of irrational behavior was sufficient to warrant an evidentiary hearing despite the stipulated opinion of a psychiatrist that the defendant knew the nature of the charges against him, could cooperate with his attorney and appeared to be mentally alert. Id., at 385-386. In Drope, this Court held that irrational behavior by the defendant prior to trial, a suicide attempt during trial and the suggestion of a psychiatrist and the defendant's lawyer that he needed psychiatric treatment created sufficient doubt of his competency and required further inquiry by the trial court. 420 U.S. at 180.

In deciding when the threshold requirement has been met, state and federal courts have held that an evidentiary

hearing is constitutionally required when the information before the trial court is sufficient to raise doubt as to the competency of the defendant to stand trial. Osborne v. Thompson, 610 F.2d 461, 462 (6th Cir. 1979); Fitch v. Estelle, 587 F.2d 773, 777 (5th Cir.), cert. denied, 441 U.S. 881, (1979); Moore v. United States, 464 F.2d 663, 655 (9th Cir. 1972); Rhay v. White, 385 F.2d 893 (9th Cir. 1967); Commonwealth v. Hill, 375 N.E.2d 1168 (Mass. 1978); State v. Spivey, 65 N.J. 21, 37, 319 A.2d 461, 469 (1974); People v. Pennington, 66 Cal. 2d 508, 518-19, 58 Cal. Rptr. 374, 381, 426 P.2d 942, 949 (1967); State v. Jensen, 278 Minn. 212, 153 N.W.2d 339 (1967). Other courts have protected the right to a determination of competency by rigorously enforcing state statutes requiring evidentiary hearings without

reaching the constitutional question. See, e.g, People v. Livingston, 57 Mich. App. 726, ___, 226 N.W.2d 704, 709 (1975), where the court reiterated that "the trial judge must announce, on the record, the commencement of a formal evidentiary hearing into the question of competency" regardless of whether a hearing is requested.

Thus, once the evidence before the trial court is sufficient to raise a reasonable doubt as to competency, the trial court must conduct an evidentiary hearing to resolve the issue.

> [A] due process evidentiary hearing is constitutionally compelled at any time that there is "substantial evidence" that the defendant may be mentally incompetent to stand trial . . . . Evidence is substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. The function of the trial court . . . is not to determine the ultimate issue: Is the

> defendant competent to stand trial? It [sic] sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue . . . .

Moore v. United States, supra at 666. The Supreme Court of California recently reiterated:

> [A]n erroneous pretrial denial of a competency hearing compels reveral of the judgment, since "the trial court has no power to proceed with the trial once a doubt arises" as to the competency of the defendant . . . " In such cases the error is per se prejudicial. Nor, as the United States Supreme Court specifically held in Pate v. Robinson . . . ., may the error be cured by a retrospective determination of defendant's mental competence during his trial."

People v. Stankewitz, 184 Cal. Rptr. 611, ___, P.2d 578, 586 (1982), quoting People v. Pennington, supra, 66 Cal. 2d at 521. The state of Mississippi has recognized that when there is sufficient doubt

about the competency of the accused, a psychiatric examination and competency determination is required. Stevenson v. State, 325 So. 2d 113 (Miss. 1975). Its trial courts are authorized by statute to order that a criminal defendant undergo a "mental examination" by a competent psychiatrist to determine his ability to "make a defense". Miss. Code Ann. Section 99-13-11 (1972) The Mississippi Supreme Court has held that after such psychiatric examination the trial court is to make a determination of competency. Stevenson v. State, supra. Here, however, the court received no evaluation of the petitioner because of his own insistence that he did not need one. It did not obtain and review any documentation of the past mental health problems of the petitioner. Instead, it limited its inquiry to

two short, in-court interviews with him. Such superficial questioning was not sufficient for a proper psychiatric evaluation of petitioner and does not comport with constitutional requirements of due process.

Courts have repeatedly recognized the importance and value of psychiatric examinations when making a determination regarding a person's competency. See e.g. Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981), United States v. Davila Nater, 474 F.2d 270 (5th Cir. 1973) United States v. Alexander, 471 F.2d 923 (D.C. Cir. 1973) cert. denied, 409 U.S. 1044, Blunt v. United States, 389 F.2d 545 (D.C. Cir. 1967), Caudill v. Peyton, 368 F.2d 563 (4th Cir. 1966), Timmons v. Peyton, 360 F.2d 327 (4th Cir. 1966), United States v. Day, 353 F.2d 123 (6th Cir. 1965), Jones v. United States,

327 F.2d 867, 875 (D.C. Cir. 1963), (Wright, J., concurring.) Although not binding on a trial court, the results of such examinations allow the court to properly evaluate answers given by a defendant in response to any questioning by the court. And, it is incumbent upon the court to establish a setting and relationship between the subject and the expert to allow for a proper evaluation. Hayes v. Murphy, supra. However, in petitioner's case there was no attempt by the trial court to create a setting for a proper evaluation.

On a number of occasions during both trials, petitioner, without explanation declared his intentions not to speak to a psychiatrist. Rather than heighten the court's scrutiny of petitioner's self-professed "sanity", petitioner's declarations

seemingly foreclosed further inquiry by the court. R. Supp. at 127. The trial court's cavalier conclusion that it would be a "waste of time" to undertake further attempts to have petitioner examined contradicts the generally accepted notion that such examinations often require extended and close observations of the subject. See Hayes v. Murphy, supra. The court made no further inquiry regarding petitioner's reluctance to speak to a psychiatrist, it did not attempt to seek alternative methods of obtaining a mental evaluation; and it made no efforts to have the records of petitioner's earlier treatment for mental disorders brought before it. Without any diagnosis of petitioner's mental disorder or any understanding of the nature, extent and duration of those problems, the trial court was not in a

position to make a reliable determination of petitioner's competency to stand trial.

In essence, both the trial court and the Mississippi Supreme Court held that petitioner had de facto "waived" his right to a competency determination because of his refusal to talk to the State's psychiatrist. In Pate v. Robinson, supra, this Court observed "it is contradictory to argue that a defendant may be incompetent yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Id. at 384. In his dissenting opinion in that case Mr. Justice Harlan pointed out that if there were errors on the question of competency "such an error is not 'waived' by failure to raise it . . . . Waiver is an apposite concept where we premise a defendant so deranged that he cannot oversee his law-

yers." Id. at 388 (Harlan, J., dissenting). Moreover, state and federal courts have squarely held that the issue of competency was not waived by failure to assert it prior to trial where evidence raising the issue was before the trial court. See, e.g., Taylor v. United States, 282 F.2d 16, 23 (8th Cir. 1960), where, in a case decided before Robinson, the Court of Appeals held that "if one is mentally incompetent, then, by definition, he cannot be expected to raise that contention before the trial court and thus cannot be prejudiced by his failure to do so . . . ."; Commonwealth v. Hill, supra, 375 N.E.2d at 1170, where the Court citing Robinson, reversed a conviction even though the defendant did not assert at any time prior to trial that he was incompetent; Fitch v. Estelle, supra at 776-777; Rhay v. White, supra at 886; State

v. Jensen, supra, 278 Minn. at 216-17, 153 N.W.2d at 342; People v. Livingston, supra, 57 Mich. App. at 726, 225 N.W.2d at 709-10.

The petitioner's reluctance to speak to a psychiatrist did not abrogate the trial court's constitutional responsibility to obtain sufficien facts about petitioner's mental state to make an informed decision about his competency. Here, the trial court, on the basis of two brief colloquies with the petitioner in open court and without obtaining any expert analysis, any diagnosis, any mental helath history or any other data about the mental health of the petitioner, allowed petitioner to be the judge of his own competency. Obviously, in another context, such as where the state seeks to obtain the involuntary commitment of one of its citizens to a mental institution, such a

result would be completely untenable. It is even more untenable here, where the state sought and obtained the death penalty. If the decision to impose death is to be a reliable one, there must be every assurance that the defendant understands the proceedings leading to that result and is able to consult with and assist counsel in defending him. Otherwise, there is the substantial risk that the defendant will make irrational decisions on matters of fundamental importance in the presentation of his case such as whether to present certain defenses[4/] or whether to offer

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4/ See, e.g., People v. Stankewitz, supra, where the question of competency was raised when his counsel informed the court that he and his client had reached impasse on whether to present the defense of misidentification or diminished capacity. 648 P.2d at 583. Obviously, a client who does not realize that he has serious mental problems cannot make a rational decision on whether to present an insanity defense.

evidence in mitigation. Such irrational decision making in the conduct of the defense undermines the reliability required in the process for determining whether to impose death. Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(opinion of Stewart, Powell and Stevens, JJ.).

Therefore, petitioner asks this Court to issue a writ of certiorari to review the decision below and decide what process is due once a substantial question as to the competency of the accused is raised in a capital case.

4/ continued

Nor is it reasonable to assume that a person suffering from paranoid delusions can make a rational decision not to offer evidence of his mental problems in mitigation at the sentencing stage of a capital trial.

CONCLUSION

For the reasons set forth in this petition, petitioner prays that this Court issue a writ of certiorari to review the decision of the Supreme Court of Mississippi.

Respectfully submitted,

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Dated: January 4, 1983

APPENDIX 1

IN THE SUPREME COURT OF MISSISSIPPI

NO. 52,780

KENNETH WILLIAM WHEAT

v.

STATE OF MISSISSIPPI

BEFORE THE COURT EN BANC

BOWLING, JUSTICE, FOR THE COURT:

Appellant Kenneth William Wheat was indicted for the crime of capital murder of Joseph M. Mayer while attempting to commit the crime of robbery by the Grand Jury of the First Judicial District of Harrison County. He received a bifurcated trial before the same jury as authorized by statute and the former decisions of this Court. After the first stage of the trial, the jury returned a verdict finding appellant guilty of capital murder. After the sentencing stage of the trial, the jury

returned a verdict sentencing appellant to death. This appeal follows in accordance with Mississippi Code Annotated, Section 99-19- 105 (Supp. 1981).

At the outset, we recognize that in this opinion it shall be necessary to refer to another indictment and conviction of appellant for the alleged capital murder of Teresa C. Hayes Mayer, wife of Joseph M. Mayer. In that cause appellant was found guilty of capital murder by the jury, but the same jury was unable to agree on a sentence; after which the trial court sentenced appellant to life under the supervision of the Mississippi Department of Corrections. The Harrison County Circuit Court docket number of the cause involving the death of Mrs. Mayer was Number 17,101 and the present cause in the lower court was Number 17,102. Appellant

interjected preliminary motions before the first trial for the death of Mrs. Mayer, which motions were filed in both causes as one motion, bearing both docket numbers, and heard by the lower court prior to the first trial. It, therefore, is necessary to refer to the first trial for specific purposes brought out in the present appeal.

On July 28, 1979, two young people, Joseph M. Mayer and Teresa Carol Hayes, were married in Paducah, Kentucky, the home of the couple and their families. After the marriage, they left on their honeymoon to the Mississippi Gulf Coast, intending to spend the first night in Memphis, Tennessee, which they did. The parents were called at about 9:20 that evening from a motel in Memphis. The next that was heard from the young married couple was on the

evening of Sunday, July 29, 1979, when Joseph M. Mayer called his father at 9 p.m. from a pay station immediately outside the Worth Motel on the beach at Gulfport in the First Judicial District of Harrison County. Young Mayer talked with his father for twenty minutes. After completion of this conversation the young couple were not heard of again until their bodies were found on July 31, 1979, in a wooded area north of Gulfport. Their hands and feet were tied behind them and each was shot in the back of the head.

The Mayers left Kentucky on their honeymoon in a 1976 Cutlass automobile owned by young Mayer. The car had attached to it a Kentucky license plate. Shortly after publicity was circulated regarding the finding of the bodies and a description of the car, four people who lived near

the place where the bodies were found reported to the sheriff's office that they had had an experience with a man driving a car of that description near their home at about midnight on the night of Sunday, July 29. In the home lived Mr. and Mrs. Algie Netto and Mrs. Netto's two sons, Gary Wayne Walker and Eugene Walker, ages 26 and 27. Around midnight or a little after, a man knocked on the door of the residence and upon being admitted, stated his car had run into a ditch a short distance down the road and asked for assistance in getting it back onto the roadway. The two Walker brothers drove the man back to the place where the car was stuck in their vehicle. They found that one of the car's tires was flat. The spare tire was exchanged for the flat tire, and the Walker brothers attempted to get the car back on the roadway but were unable

to do so. They then went back to the residence to secure the help of their step-father, Algie Netto. The latter drove his tractor to the scene and was able to pull the car back on the roadway. The driver of the car then drove to the Netto residence and stayed there for a period of time drinking ice water and talking. He then left in the Cutlass with the Kentucky license plate.

The Walker brothers testified that during the ride from their residence to the Cutlass car, the car's driver sat between them in the pickup truck. They testified that they were able to observe him fully. They also testified they were able to observe him fully at the scene, as their vehicle's lights were left on for assistance in working on the Cutlass. Mr. and Mrs. Netto and the Walker brothers stated

that they had ample opportunity to see the driver of the car fully while he was at their residence drinking water.

A description of the man in the Cutlass was given to the artist connected with the sheriff's department. From these descriptions a composite sketch of the man was made and immediately circulated. Shortly thereafter Deputy Sheriff Harold Lloyd Wheat [no relation to appellant] of adjoining Pearl River County, contacted the Harrison County Sheriff's Department and advised that the composite sketch resembled appellant, who was reared in that county, but had been away from the state for a number of years.

On October 19, 1979, appellant was arrested in Orlando, Florida, and later returned to Harrison County, Mississippi, under the charges of murdering the Mayers.

In the meantime, subsequent to the completion of the official investigation, appellant was indicted on September 28, 1979, by the Harrison County Grand Jury.

As hereinbefore stated, appellant was first tried in December 1979, for the alleged capital murder of Mrs. Mayer. The trial of the cause sub judice began on January 14, 1980, and ended on January 18, 1980. At the trial, Mr. and Mrs. Netto and Gary and Eugene Walker positively identified appellant as the man who was driving the Mayer's car at about midnight on the night the Mayers were last heard from at approximately 9:30 p.m. They described his appearance in detail, including his clothing. They positively identified a photograph of the Mayer car as the one occupied and driven solely by appellant on the night the Mayers met their death. A

cashier at a local restaurant near the Worth Motel testified from photographs that the Mayers came in for dinner about 6:30 p.m. on Sunday, July 29, and were there about one or one and a half hours. She testified that they were alone during the entire time.

A relative of appellant testified that he had known appellant all his life, and in March 1979, he was called by appellant to come and get him at a bar in Harrison County. Appellant according to the relative had been gone from the State of Mississippi about nineteen years and talked with an accent he did not have when he left the state. [The Nettos and Walkers also testified appellant talked with an accent on the night the Mayers met their death.] The relative testified that from March 1979 until about the time of the

Mayers' deaths, appellant stayed at either his house or the house of another relative. He never saw appellant after the Mayers were found dead. He testified that during the time appellant was staying at his house or the other relatives' house, appellant had a Vandyke beard. [The Nettos and Walkers testified appellant had a Vandyke beard.] Another relative Dwayne Wheat testified that he went with appellant to the County Courthouse and helped him secure a driver's license. He testified the last time he saw appellant was about July 28, 1979.

Linda Perry, daughter of Earl Wheat and cousin of appellant, testified she last saw appellant on Saturday, July 28, 1979.

Testimony was admitted from Al Winchell, jailor with the Harrison County Sheriff's Department. He testified on

November 29, 1979, appellant called him to his cell and gave him a sealed envelope addressed to Jim Kelly, head jailor, which Winchell immediately gave to Kelly. This note was introduced in evidence and read: "Notify my lawyer and Sheriff Hobbs that I want to plead guilty to the Mayer murder charges tomorrow and I want to be sentenced next week. Kenneth Wheat. 11-29-79." Mr. Kelly immediately notified the sheriff and appellant's attorney. Later the same day, Wheat gave the jailors another hand written note stating that he was innocent of the Mayer murders, but in order to spare himself and his family the suffering, he was pleading guilty. He headed this note "Press Release."

Orlando Florida Police Officer Stephen Finkel testified that upon the arrest of appellant, he first gave a fictitious

name but later admitted he was Kenneth Wheat and was wanted for murder in Mississippi.

Appellant propounds five assignments of error in this appeal:

> I. THE COURT ERRED WHEN IT FAILED TO REQUIRE THE DEFENDANT TO UNDERGO A MENTAL EXAMINATION TO DETERMINE HIS COMPETENCE TO STAND TRIAL, AND HIS COMPETENCY AT THE TIME OF THE COMMISSION OF THE ALLEGED OFFENSE.
>
> II. THE COURT ERRED WHEN IT FAILED TO DIRECT A VERDICT FOR THE DEFENDANT AT THE CLOSE OF THE STATE'S CASE AS TO THE CRIME OF CAPITAL MURDER.
>
> III. THE COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY AS TO LESSER INCLUDED OFFENSES OTHER THAN CAPITAL MURDER, AND IN FAILING TO ALLOW THE JURY TO CONSIDER LESSER INCLUDED OFFENSES OTHER THAN CAPITAL MURDER.
>
> IV. THE COURT ERRED WHEN IT ALLOWED THE JURY TO CONSIDER THE DEATH PENALTY FOR THE DEFENDANT, IT SHOULD HAVE DIRECTED A VERDICT AS TO SENTENCE, AND SHOULD HAVE SENTENCED THE DEFENDANT TO LIFE IMPRISONMENT.

V. THE COURT ERRED WHEN IT INCORPORATED THE RULING OF THE PREVIOUS COURT DENYING A MOTION TO SUPPRESS CERTAIN ORAL AND WRITTEN STATEMENTS, WITHOUT RECONSIDERING THE SAME.

ASSIGNMENT NO. I.

This assignment challenges the alleged failure of the court to require that the defendant have a mental examination to determine his competency to stand trial and his competency at the time of the alleged crime. In order to get a complete picture of all matters surrounding the admitted failure of appellant to undergo a mental examination, we need to look at the complete history of that issue. On November 15, 1979, appellant's attorney filed a "Motion for Mental Examination." He filed one instrument in both indictments with the instrument carrying the circuit court numbers of both indictments. The motion

was filed under MCA § 99-13-11 (1972), which provides that the trial court may order an accused to submit to a mental examination on motion made by the defendant, the district attorney, or the court's own motion. A hearing was had on the motion before Circuit Judge Leslie B. Grant on November 28, 1979. It should be noted that all three of the circuit judges in the district were involved in either motions or trial under the two indictments of appellant. Before the hearing on the motion began, appellant's attorney announced to the court that after advising appellant that the motion had been filed, appellant advised the attorney that he "would not voluntarily in any event" undergo such an examination. The attorney requested that he be allowed to withdraw the motion without hearing. The appellant was in the

courtroom during the hearing. He was asked by the trial judge if he understood that the motion had been filed, and received an affirmative answer. Appellant was then asked if he understood that he was requesting that the motion be withdrawn. The court again received an affirmative answer. The court asked appellant, "Do you agree with that request?" Appellant's answer was, "Yes, sir." Accordingly Circuit Judge Grant stated that, "It does not appear to the court that he needs a mental examination and therefore the request to withdraw the motion is granted and the motion is considered withdrawn." A written order allowing the withdrawal was signed by Judge Grant and filed in both causes.

On November 30, 1979, the state through the district attorney filed a motion for mental examination of appellant.

[Supp. Record Volume I, p. 44]. The motion recited the withdrawal of the motion filed by appellant and stated that due to the appellant's writing the two hereinbefore discussed notes to the jailor, that the state wished a mental examination of appellant. A hearing was had on this motion on November 30. [Supp. Record Volune II, p. 114]. This hearing was had before Circuit Judge Ruble Griffin, who later was the trial judge under the indictment for the death of Mrs. Mayer. The state's motion, as was the appellant's withdrawn motion, was a single instrument filed under the style and numbers of both indictments. The appellant was present in the courtroom during the hearing on the state's motion. The district attorney made an oral statement that is shown in the record regarding the two notes written

voluntarily by appellant. The district attorney stated his doubts that appellant was insane, but it was thought by the prosecution that a mental examination should be made to be sure. Stating that, "I don't want the defendant setting the state up . . . ." and "I don't want it to go unnoted that the state did not make an attempt."

It should be noted at the outset that appellant's attorney objected to the motion being granted, as only two days before appellant's motion had been withdrawn. Regardless of the objection of appellant through his attorney to the motion, the lower court properly proceeded to have a hearing on the motion under the strenuous objection of appellant and his attorney. After these objections and the statements by appellant's attorney that he

and appellant were communicating satisfactorily, the following occurred: [supp. Record Volume II, p. 122].

BY THE COURT: May I ask Mr. Wheat a question?

Mr. Wheat, do you understand why it is you were brought back up here again today?

BY THE DEFENDANT: Yes, Sir. Do you want me to stand up?

(THE DEFENDANT STANDS BEFORE THE COURT)

BY THE COURT: Of course, that being that the District Court filed a Motion to have you examined by a psychiatrist. My understanding is you previously before Judge Grant, who had heard all of the motions up to this

point. I'm Judge Griffin. I'm the one who will be trying your case if we go to trial next week. It is my understanding that Mr. Stegall did file a Motion to have you examined by a psychiatrist.

BY THE DEFENDANT: I withdrew it.

BY THE COURT: You wanted him to withdraw it. Is that correct? What is your attitude about the motion today?

BY THE DEFENDANT: What?

BY THE COURT: What is your attitude about the District Attorney's Motion? Is it the same?

BY THE DEFENDANT: Well, I think

I'm sane. I don't require a . . . .

BY THE COURT: Just go ahead and explain it to me however you want to.

BY THE DEFENDANT: If the Court orders it I'm going to refuse it. I'm ready to go to trial Monday.

BY THE COURT: You say that you would refuse it?

BY THE DEFENDANT: Yes, Sir.

BY THE COURT: By that -- Of course, we could physically remove you to the psychiatrist's office. You understand that?

BY THE DEFENDANT: I would remain silent.

BY THE COURT: You would remain

silent. Of course, I cannot make a man talk. I don't have that power; and without him talking, Mr. Necaise, I don't think it . . .

BY MR. NECAISE: I'll ask the Court to inquire any further if he has desires of having one, or if he resists . . .

BY THE COURT: If he says he is not going to talk to one, I think the answer to that question has already been made.

BY MR. NECAISE: Could I ask the Judge to ask him that question for the purpose of the record?

BY THE COURT: All right. Are you desirous of having an examination? I believe that was the question.

BY THE DEFENDANT: I said if the Court appoints -- demands that I -- I can't hear too good. I've got an ear infection in both ears. I can't hear myself talk. If the court orders the examination I'm going to refuse to say anything to the psychiatrist. That's how it is.

BY THE COURT: In other words you don't want one?

BY THE DEFENDANT: Right. That's a way of saying it

BY THE COURT: That's right. I think you're absolutely correct. There's no doubt about that. Are you hard of hearing, Mr. . . .

BY THE DEFENDANT: I have an infection in both ears. I had to see a doctor today; so, I can't hear too good. Both my ears are infected.

BY MR. STEGALL: Normally, Judge, his hearing is good.

BY THE DEFENDANT: Normally I have good hearing.

BY THE COURT: Oh, I see. Well, I notice you speak rather loudly. Sometimes people with poor hearing do talk louder.

BY MR. STEGALL: I told him to speak up to you, Judge.

BY THE COURT: Oh, you did? Well, he's responding to your advice. There's no question about that.

BY THE DEFENDANT: I have to hear myself talk. You know, I can't. . .

BY THE COURT: Yes. And have you ever been treated by a psychiatrist, Mr. . . .?

BY THE DEFENDANT: Yes.

BY THE COURT: Where was that, Mr. Wheat?

BY THE DEFENDANT: Most people who go to prison for a long time require psychiatric help because prisons are snake pits in New Jer-

sey. It's a big insane asylum, you know; and . . .

BY MR. STEGALL: Could I have the Court's indulgence?

BY THE DEFENDANT: . . . problems, you know? It includes the prison officials as well as the inmates.

THE COURT: Well, this is not going to be held against him in this hearing. I think I am entitled to let him respond to the question. I'm not going to be a witness against him.

BY MR. STEGALL: No, sir. I'm not concerned about the court.

BY THE COURT: And what he said here is not going to

be used against him. You understand that?

BY THE DEFENDANT: Yes, Sir. But I'm saying it's not uncommon for a prison or prisoner in Trenton State Prison to be under psychiatric care. The majority of the inmates are. And a lot of times they may try to get themselves sent to the State Hospital because it's a lot better place than Trenton Prison. You've got more privileges; so, inmates try to play crazy to get sent there, not because they are crazy.

BY THE COURT: I don't doubt that at all, and I feel a little sympathetic with

them. Go ahead. Do you have anything else you want to tell me?

BY THE DEFENDANT: I'm finished. I'll see you in trial Monday.

BY THE COURT: All right, Sir. Well, Mr. Necaise, I feel this way about it. I can't make a man talk to a psychiatrist; and Mr. Wheat has told me unequivocally -- Let me ask you one other thing. Did you ever get a report from any psychiatrist, Mr. Wheat? Never did receive one?

BY THE DEFENDANT: They keep everything secret in prison.

BY THE COURT: Nobody has ever advised you that you do need medical treatment?

BY THE DEFENDANT: They say everybody in prison is crazy. All inmates are crazy. If they weren't crazy, they wouldn't be in prison. That's the way they think, you know? Sane people stay free, and crazy people wind up in prison, you know? I don't think I need any treatment right now. I'm fully prepared to go to trial and communicate with my lawyer in every way.

BY THE COURT: Well, of course, Judge Grant has already made a

finding rather unequivocally that it didn't appear to him that the man needed any treatment. He hadn't indicated anything to me today that would cause me to think differently from what Judge Grant found. So, I find that the man's rational, able to communicate with his attorney, has expressed a desire to stand trial, and as far as his correspondence and things that he has done in the past, even in relation to this case, like statements made to the paper in Orlando, I'm not going to inquire into his motives in

making those statements. I assume that he had it at least in his own mind, a good motive; a motive, not good, but that would probably be a mistake to state that; but a motive that was in his own best interest. I think he is able to form motives, intent, that would be in his own best interest. Is that right, Mr.? And whatever purpose he made that, I think he felt like it might be to serve him well to make those type of statements; and I think he is nodding that he did do that. So, I think it would just be a waste of time to

have the man -- try to attempt to have the man examined in light of his statements that he has made here today. We can't anticipate everything that's going to happen two years from now or a year from now in the State Supreme Court or some federal court on petition for Writ of Habeas Corpus. I just can't anticipate all of that. As far as I'm concerned the man is ready to go to trial, able to go to trial. There's no doubt in my mind about that. I deny the State's motion and send him back to jail; and have

everybody here at 10:00 Monday morning. I've had the jury ordered to come in at 9:30 to get the little cards filled out, so everybody can get a better look at who's here and all that; but I don't see the point any further on this. That's all. I don't like to disagree with the District Attorney, but in this case I do. I can't see there's any point in this. All right. Okay. You go back to jail.

BY MR. STEGALL: Thank you your Honor.

As hereinbefore stated the trial on appellant's indictment for capital murder

of Mrs. Mayer was had the first week in December 1979 and ended on December 7. After the guilt phase of the trial was presented to the jury, the verdict was brought back finding appellant guilty of capital murder on the morning of December 7. Immediately thereafter, and with appellant facing a possible sentence of death, his attorney filed another motion for mental examination of appellant. [Supp. Record Volume I, p. 47]. A hearing was had on this motion out of the presence of the jury and appears beginning at page 104 of Supp. Record Volume I. The Court requested appellant's attorney to ask him if he had changed his mind since insisting that the pretrial motion for mental examination be withdrawn. The appellant then stated he had changed his mind and wanted an examination. The trial court held that it was going ahead with the

sentencing phase of the bifurcated trial, but was going to sustain the motion for mental examination at the conclusion of the trial. Evidence was then presented on the sentencing phase and as hereinbefore stated, the jury was unable to agree on a verdict which resulted in the appellant receiving life sentence.

On December 11, 1979, four days after the conclusion of the trial, the trial judge entered a written order requiring a mental examination of appellant, naming the physician who would make the examination. [Dr. Henry Maggio, Supp. Record Volume I, p. 57]. The court in its order directed that the sheriff transport the defendant to and from Dr. Maggio's office.

What occurred after the court entered its order of December 11 appears in the hearing on appellant's motion for new trial after his conviction of capital murder of

Mrs. Mayer [Supp. Record Volume I, p. 6]. At the outset of the hearing on the motion for new trial, appellant's attorney stated that appellant had requested him to advise the court he did not wish to proceed any further with any appeal. Appellant's attorney stated, however, he wished to proceed with the hearing on his motion for new trial. Appellant's attorney agreed that on December 7 after the jury's verdict on the guilt phase, appellant stated he had changed his mind and did want to undergo a mental examination. His attorney then went on to say that after the jury was unable to agree on a verdict in the penalty stage, the appellant had changed his mind and refused to undergo the examination ordered on December 11, even though he actually was carried before Dr. Maggio. [Supp. Record Volume I, p. 18]. The defendant requested that he

be allowed to make a statement and the following colloquy of questions and answers were had between the trial judge and defendant:

BY THE DEFENDANT: I've been under a lot of pressure to submit to a psychiatric examination by a lot of people. And, uh, I definitely don't want to be examined and that's sort of the story. And, uh, I've come to this conclusion about not wanting to appeal. Uh, it's taken me a lot of time to think about it as a result of careful deliberation and, uh, it's not because I'm crazy like Mr. Stegall says.

BY THE COURT: Well, I don't think Mr. Stegall is accusing you of being crazy. Mr. Wheat. I think Mr. Stegall is a very sincere attorney and, uh, if there's any doubt about that, he wants it resolved and he wants to take advantage of every, uh, honorable, legal remedy that's available to him, for your benefit. That's Mr. Stegall's purpose of it by, uh, ...

BY THE DEFENDANT: (Interposing) I realize that.

BY THE COURT: Yes, sir. You realize that.

BY THE DEFENDANT: Yes, sir.

BY THE COURT: And you're not mad with him because he raised the issue, are you?

BY THE DEFENDANT: Oh, no, no, we're still good friends.

BY THE COURT: All right.

BY THE DEFENDANT: We're still good friends.

BY MR. STEGALL: I thank you.

BY THE COURT: All right. Uh, of course, I'm going to, you can have your appeal without cost to you. Uh, I don't know what you want to, uh, I want you to think about it further.

BY THE DEFENDANT: I've already thought you see, I believe that the, uh, that if I appeal it, it will be a

repeat of the same thing, of the same thing, of the first trial. And I can't see making a . . . go through this, you know, making a repeat performance.

BY THE COURT: Well, you're still facing another trial.

BY THE DEFENDANT: Right, right, right.

BY THE COURT: Here.

BY THE DEFENDANT: If I get a gas chamber verdict in the second trial, I will appeal.

BY THE COURT: Then, you can't . . . . .

BY THE DEFENDANT: (Interposing) I promise you that.

BY THE COURT: Then, you can't appeal this one because

you will have waited too long.

BY THE DEFENDANT: What?

BY THE COURT: You will have waited too long to perfect an appeal in this case, you see . . . . .

BY THE DEFENDANT: (Interposing) I said, I said . . .

BY THE COURT: . . . . . if you wait till then.

BY THE DEFENDANT: I said if I get a gas chamber verdict in the second trial, I will appeal that.

BY THE COURT: That case only?

BY THE DEFENDANT: Right, right.

BY THE COURT: Oh, I . . . . . .

BY THE DEFENDANT: (Interposing) This one right here,

it's uh, it's over and done with as far as I'm I'm concerned.

BY MR. STEGALL: Judge, I'd like to talk with him further.

BY THE COURT: All right. I think you ought to consult with Earl further about it, Mr. Wheat, and, uh, you all talk about it. Of course, I'll grant you an appeal without cost to you, you understand.

BY THE DEFENDANT: All right. But, uh, nothing he can say or do is going to make me change my mind. I definitely don't want to appeal.

BY THE COURT: Well, I want you

to give that to him in writing.

BY THE DEFENDANT: All right. Why can't we do it here, now?

BY THE COURT: No, sir. I'll let you do it in your uh, when you're in solitary by yourself. And, uh, I think it would work out better that way.

BY THE DEFENDANT: We, uh, have a little misunderstanding, you know, from time to time, but, uh, basically, we get along good, you know.

BY THE COURT: Well, that's natural. I've never known a lawyer and his client that

didn't have some misunderstanding. It would be highly unusual if they didn't.

BY THE DEFENDANT: Right.

Summarizing what occurred regarding the mental examination of appellant, we have the following: his attorney filed pretrial motions in both causes which were withdrawn at the demand of appellant with the trial judge questioning appellant and ruling that he was entitled to withdraw his motion and he did not appear to need an examination. The state then out of an abundance of caution filed its own motion two days later requesting that appellant beforced to have such examination. Appellant stated positively that he would refuse to undergo such an examination and would stand mute. The court questioned appellant extensively and came to the conclusion that he did not need a mental examination.

After the trial of the first case on the guilt phase, the appellant facing a possible death penalty changed his mind and stated he would agree to an examination. The lower court stated that an order would be entered after the conclusion of the trial to have a mental examination of appellant. In the meantime, however appellant did not get the death penalty, so he again changed his mind and refused to have the ordered mental examination. It is evident that appellant was merely playing with the court. All three circuit court judges gave appellant every opportunity to have an examination. It should be pointed out here that at no time did appellant or his attorney propound insanity as a defense to either indictment. In fact, it was announced to the court that appellant was not making a defense of insanity. [Supp.

Record Volume II, p. 121]. We find no merit in appellant's first assignment of error. Whatever error was committed was done by appellant alone and was done according to the record in a rational manner.

ASSIGNMENT OF ERROR NO. II

Appellant contends under this assignment of error that he could not receive the death penalty as there was no proof of the crime of robbery in connection with the alleged murder. No authority or discussion is needed on the proposition that a person cannot be convicted of capital murder and receive the death penalty unless the alleged murder is done under certain circumstances. One provision of which is stated "When done without any design to effect death by any person engaged in the commission of the crime of rape, burglary, arson,

or robbery, or in any attempt to commit such felonies." [MCA § 97-3-19 (1972)].

It is the contention of appellant that the testimony in regard to the taking of the car of the deceased was not "an intent to commit robbery." Appellant requested and received an instruction (D-13) defining robbery, which stated:

> The elements of the crime of robbery are that the defendant must have intentionally and without authority of law taken the personal property of the said Joseph Mayer in his presence and against his will, by violence to his person or by putting him in fear of some violence to his person.

At approximately 9:30 p.m. on the night Joseph Mayer was killed, he was at the Worth Motel on the beach 26 miles from where he was killed that same night. The jury found that appellant killed him. Approximately two and one-half hours after the young couple were together at the motel, appellant appeared at the Netto home

with the Mayer car which place was approximately 1.4 miles from where Mayer was killed. Appellant was in complete possession of the Mayer car, along with its contents, consisting of a leather case, luggage, books, camera, radio, baseball bat, and maps.

This Court had a similar set of facts before it in the case of Voyles v. State, 362 So.2d 1236 (Miss. 1978), cert. denied 99 S. Ct. 2184, 441 U.S. 956, 60 L. Ed. 2d 1059 (1979). We said the following in that case:

> Appellant contends that the evidence was not sufficient for the jury to find beyond a reasonable doubt that the alleged killing occurred while appellant was engaged in committing the crime of robbery and, therefore, the appellant could not be guilty of the crime of capital murder, which is a crime punishable by death. Miss. Code Ann. § 97-3-19 (Supp. 1977).
>
> There is no contention that the jury was not completely, fully, and ade-

quately instructed by the court on the questions of law involved in a so-called felony-murder. The court fully instructed the jury on the statutory definition of robbery, which, according to Code section 97-3-73, is as follows:

> Every person who shall feloniously take the personal property of another in his presence or from his person and against his will, by violence to his person or by putting such person in fear of some immediate injury to his person, shall be guilty of robbery.

Appellant questions the sufficiency of the evidence to prove that he had the "intent" to commit the crime of robbery. This Court said in Shanklin v. State, 290 So.2d 625 (Miss. 1974):

> Intent to do an act or commit a crime is also a question of fact to be gleaned by the jury from the facts shown in each case. The intent to commit a crime or to do an act by a free agent can be determined only by the act itself, surrounding circumstances, and expressions made by the actor with reference to his intent. Thompson v. State, 258 So.2d 448, (Miss. 1972); Lee v. State, 244 Miss. 813, 146 So. 2d 736 (1962).

The Court further said in Thompson v. State, 258 So. 2d 448 (Miss. 1972), the following:

> Unless one expresses his intent, the only method by which intent may be proven is by showing the acts of the person involved at the time in question, and by showing the circumstances surrounding the incident.

The criteria for this Court to use in passing on a motion for a directed verdict which was requested under this assignment by appellant is stated in Bullock v. State, 391 So. 2d 601, 610 (Miss. 1980).

> In passing upon a requested peremptory instruction, or motion for directed verdict in a criminal case, all evidence most favorable to the State, together with reasonable inferences, are considered as true and evidence favorable to the appellant is disregarded. If such evidence will support a guilty verdict, the request for peremptory instruction must be denied, as well as the motion for directed verdict. Warn v. State, 349 So.2d 1055 (Miss. 1977); Toliver v. State, 337 So.2d 1274 (Miss. 1976).

Fully considering the history of all that occurred on the night in question, the condition of Mayer's body with his hands and feet tied, and a bullet hole through

the back of his head and shortly thereafter appellant being solely in full possession of the Mayer vehicle and its contents, is clearly a question for the jury as to whether or not he "robbed" Mayer of his car. There certainly is no other reason shown in this record for the brutal murder of young Mayer.

ASSIGNMENT OF ERROR NO. III

This alleged assignment of error may be disposed of merely by stating that the appellant did not request an instruction as he alleges in this assignment. The court fully instructed the jury as to all elements to be considered in finding that the killing of Mr. Mayer was "capital murder" rather than "murder," for the reasons discussed in Assignment No. II. Furthermore, appellant did not request an instruction on a lesser included offense as he now

contends should have been given. As discussed in Assignment II the jury had ample evidence to find that the alleged murder was perpetrated during an intent to commit robbery. The jury was amply instructed that it was necessary for them to so find before returning a verdict of capital murder. We find no merit in this assignment of error.

ASSIGNMENT OF ERROR NO. IV.

Appellant contends that he should have been sentenced to life imprisonment at the conclusion of the guilt phase of the bifurcated trial and the jury should not have been allowed to return the death penalty verdict. The basis of this contention seems to be that because the trial for the alleged murder of Mrs. Mayer resulted only in a life sentence that the giving of the death sentence for the second murder

committed at the same time is barred under the principles of res judicata and collateral estoppel.

Appellant, of course, is concerned by the fact that the jury in the penalty phase trial of the killing of Mrs. Mayer resulted in the jury not agreeing on the death penalty; whereas they did find a verdict for the death penalty in the case sub judice. Any court may take judicial knowledge that under the make-up of various juries, there is no prediction or known reason why different verdicts are reached. There is one situation, however, in the case at bar which stands out. It is that as we have hereinbefore discussed, a capital murder conviction and resulting death penalty may be had only if a murder is committed while performing certain other acts including robbery. The proof is that

the car in the sole possession of appellant shortly after the death of young Mr. and Mrs. Mayer was owned by Mr. Mayer and not Mrs. Mayer. If we should speculate, which we do not, the first jury could have reasoned that Mr. Mayer was the one robbed of his property. We shall see later that the jury in the case sub judice specifically found that this was a robbery of "Mr." Mayer's property.

Appellant relies on the case of Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970), Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852 68 L.Ed.2d 270 (1981).

These cases easily are distinguishable from the case sub judice. In Ashe, we have masked men breaking up a poker game by robbing each individual player. Ashe was indicted for robbery of each person. On

his first trial the jury found him not guilty. The issue in the case was a question of "identity," as to whether Ashe was one of the robbers. The first jury found he was not. The Supreme Court held that the rule of collateral estoppel applied and the prosecution should not be allowed to have another jury pass on this question. In the case at bar, we have an entirely different situation -- there were two murders. Appellant was tried and convicted of capital murder. The only difference between the two trials was that the jury in the first failed to agree on punishment. The case sub judice was a trial for a separate and distinct murder, for which he had not received a prior acquittal. In the penalty phase of the trials there was no question of identity as the Supreme Court had in Ashe, supra.

In Bullington, supra, there had been a prior trial and an acquittal of the accused, which as shown above was entirely different from the facts presented in the present case. We find no merit in this assignment.

ASSIGNMENT OF ERROR NO. V.

Appellant alleges error in the refusal of the trial judge in the case sub judice to rehear a request by appellant to suppress the two voluntarily given notes written in appellant's handwriting while confined in jail. We heretofore have discussed these notes. It is admitted that appellant had been given all of his constitutional warnings, including Miranda, an attorney was appointed for him and representing him at the time. Admittedly, without consulting his attorney, appellant wrote the two notes in question in his cell

and gave them to the jailor to be given to the head jail warden. Appellant was the one who chose to do this without consulting his attorney.

Prior to the trial for the death of Mrs. Mayer, appellant's attorney moved to suppress both of the notes. This motion was styled and filed as a motion in both indictments and as one instrument filed in both causes. The hearing before the trial judge prior to the first trial definitely was a hearing on both indictments. The lower court in refusing to suppress the voluntarily written statements said:

> Well, the court finds beyond a reasonable doubt that on November 29, 1979, [the day the notes were written], that the defendant was aware of his Fifth Amendment Rights and any notes that he wrote on that day were freely and voluntarily written without coercion, threats or intimidation and I will hold that they are admissible for whatever eviden-

> tiary value they may have whether it be for verification of his handwriting or whatever significance the Jury might attach to it.

At the trial of the case sub judice before a different trial judge, appellant's attorney again requested that the notes be suppressed. The most that can be said is that he was trying to get a second judge to change the court's mind. This could not be done. We have already seen that the prior hearing was in both cases and the ruling of the first trial judge applied to both. No new grounds whatever were offered in the trial sub judice to change the ruling made by the first trial judge. We find no merit in this alleged assignment of error.

This Court carefully has considered the entire record in the cause, together with all exhibits, briefs, and all instruments appearing either in the original

record or the supplemental volumes of the record and they clearly reveal that the jury was fully and adequately instructed before considering either the guilt phase or the penalty phase of the bifurcated trial. On the penalty phase the state and the appellant introduced all of the record involving the guilt phase of the trial. Appellant introduced nothing else. The state introduced appellant's prior record consisting of a conviction of second degree murder, a conviction of assault with an offensive weapon and a conviction of false imprisonment.

Full and complete instructions were given the jury on the sentencing phase according to prior opinions of this Court involving the same instructions which have been approved by the United States Supreme Court. The jury unanimously found

that there were insufficient mitigating circumstances to outweigh the aggravating circumstances. They found that the murder of Mayer was committed in the course of the crime of robbery adding "the car belonging to Joseph Mayer." The jury specifically found that in addition to appellant committing the murder in the course of the crime of robbery, that the murder was committed in an especially heinous, atrocious and cruel manner in that the victim was bound hands and feet by his own clothing, was shot in the back of the head by direct contact, his body abandoned in a secluded area, and that appellant was previously convicted of three felonies.

Under the capital murder statute [MCA § 99-19-101 Supp. 1981)] adopted by the Legislature on April 13, 1977, and appearing as the Laws of 1977, Chapter 458, the

Legislature confined aggravating circumstances to eight sub-head situations. In the case sub judice the trial judge instructed the jury that they were only to consider three statutory circumstances, they being the ones listed specifically by the jury in its verdict. The lower court correctly confined the jury to finding only aggravating circumstances that were proven by the evidence. The jury was not left to make its own findings of aggravating circumstances as was condemned in Jordan v. Watkins, et al., 681 F.2d 1067 (5th Cir. 1982). The court's instructions "channelled the sentencers' discretion by 'clear and objective standards and provided specific and detailed guidance.'" The court specifically instructed the jury that it was to find beyond a reasonable doubt that one or more of the three above discus-

sed aggravating circumstances existed before a death penalty verdict could be returned and was specifically instructed that if none of these elements were found to exist, the death penalty could not be imposed. The jury's authority was limited and it was specifically instructed regarding its consideration of aggravating circumstances under the evidence submitted. No speculation was left for the jury.

We have carefully reviewed the present record, along with all of the death penalty cases considered by this Court subsequent to Jackson v. State, 337 So.2d 1242 (Miss. 1976). We have carefully compared those cases with the present case and clearly find that the conviction and death penalty verdict of appellant in the present case is consistent and even-handed with all of the death penalty cases reviewed as stated above.

A study of the entire record convinces this Court that the sentence of death was not imposed by the jury under influence of passion, prejudice or any other arbitrary factor. The evidence reveals that the jury was fully warranted in finding the statutory aggravating circumstances to exist as shown in the jury's verdict. The sentence of death clearly was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. As stated, all death cases subsequent to Jackson, supra, have been fully reconsidered by this Court, and we do not find any prejudice or error in the present case after such consideration.

The record reveals that appellant's trial attorneys were competent and defended appellant in a vigorous, reputable and

efficient manner. He received a fair trial.

The cause is affirmed and December 8, 1982, set for the execution of the death sentence as provided by law.

AFFIRMED.

PATTERSON, C. J., SUGG AND WALKER, P. JJ., AND BROOM, ROY NOBLE LEE, HAWKINS, DAN M. LEE AND PRATHER, JJ., CONCUR.

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

FIRST JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VS. NO. 17,101
17,102

KENNETH WILLIAM WHEAT DEFENDANT

MOTION FOR MENTAL EXAMINATION

Comes now Kenneth William Wheat, by and through Counsel, who has reasonable cause to believe that the Defendant may be so mentally incompetent as to be unable to understand the proceedings against him or properly assist his attorney in the defense of his case, and respectfully moves this Honorable Court to enter an Order directing the Defendant to submit to a mental examination at the Coast Mental Health Center in Gulfport, Mississippi,

by a competent psychologist as provided for in Section 99-13-11 of the Mississippi Code of 1972, Annotated, Counsel for the Defendant further asks that at the conclusion of said examination and evaluation of said Defendant herein, the examiner may furnish a complete record and report of his findings to the Court and furnish Counsel for the Defendant a full copy of same.

In support of the Motion, your Movant would respectfully show the following, to-wit:

I.

The Defendant herein was indicted and charged with the crime of CAPITAL MURDER, Two (2) Counts.

II.

The Defendant's Counsel has attempted to ascertain facts of the situation surrounding the allegation of the above mentioned crimes, but has been unable to do

so. The Defendant is unable to relate such facts, was unable to understand the nature of the charges against him, and is unable to assist Counsel in the defense of his case.

III.

And for other causes to be shown at a hearing of this Motion.

Respectfully submitted,

KENNETH WILLIAM WHEAT

BY:_____
EARL B. STEGALL
Of Counsel.

C E R T I F I C A T E

I, Earl B. Stegall, do hereby certify that I have on this day personally delivered a true copy of the foregoing Motion for Mental Examination to the

Honorable Albert Necaise, District Attorney, on this the 15th day of November, 1979.

EARL B. STEGALL

HESTER AND STEGALL
Attorneys at Law
P.O. Box 1826
Gulfport, MS 39501

APPENDIX 3

- 68a -

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

FIRST JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VERSUS NO. 17,101 & NO. 17,102

KENNETH WILLIAM WHEAT

MOTION FOR MENTAL EXAMINATION

Comes now Albert Necaise, District Attorney in and for the Second Circuit Court District of the State of Mississippi of which Harrison County, Mississippi is included, and requests this Honorable Court to enter the necessary order directing the defendant herein, to submit to a mental examination by a competent psychiatrist, and further, at the conclusion of said examination and eveluation of said defendant, the examiner shall furnish a copy

of the complete findings to the State of Mississippi and the Court, and for reason thereof, would show the Court the following, to-wit:

I.

The defendant, Kenneth William Wheat was, on the 28th day of September, 1979, indicted by the Grand Jury of the First Judicial District of Harrison County, Mississippi, for the crimes and felonies of Two (2) counts of Capital Murder.

II.

That on a prior day the Attorney for the defendant did file a Motion for Mental Examination, and the defendant, of his own volition, did request his attorney to withdraw the said Motion, and in open Court the said attorney did comply with the demand of the defendant, and did withdraw said Motion for Mental Examination, and the

Court after ascertaining from the defendant that it was his desire to withdraw the Motion for a Mental Examination filed on a prior day of this term of Court, and the Court did enter the proper order allowing the same to be withdrawn.

III.

The defendant, Kenneth William Wheat did, after being apprehended in Orlando, Florida, and being identified as being wanted in this jurisdiction for Two (2) Counts of Capital Murder, did grant an interview with Mike Fiedler, Reporter, Orlando Sentenial Star, Orlando, Florida, date unknown. (A copy of the printed story attached hereto and made a part hereof, being marked exhibit "A"). The contents of the story is far fetched and is the product of a person that is not rational.

IV.

On the 29th day of November, 1979, the

defendant, while incarcerated in the Harrison County Jail, sent a note to the Warden of the Harrison County Jail to notify his lawyer and the sheriff that he wanted to plead Guilty to the Mayer's murder. (A copy of note being attached and made a part hereof, and marked exhibit "B".)

The lawyer for the defendant and the Sheriff complied with the request of the Defendant. The defendant, Kenneth William Wheat did then present to the Sheriff a prepared statement, entitled "Press Release", wherein he profoundly insists he is innocent of the crimes of the murders wherein he is charged and therein cites the reasons why he was charged. (a copy of note being attached and made a part hereof, and marked exhibit "C").

V.

Due to the irratic behavior of the defendant by his statements, the State of Mississippi feels that an examination as requested is in order.

Respectfully submitted,

_____
DISTRICT ATTORNEY

I hereby certify that
the above and foregoing
constitutes a true and
correct copy.
W. L. LEE
Circuit Clerk

STATE OF MISSISSIPPI

COUNTY OF HARRISON

Personally came and appeared before me, the undersigned authority in and for the aforementioned County and State, Albert Necaise, who after being duly sworn by me upon his oath, states that he is the duly elected District Attorney, in and for the Second Circuit Court District of Mississippi, and that he has filed the Motion for a Mental Examination for Kenneth William Wheat, and all of the matters and things averred and stated in the Motion for Mental Examination are stated on information and belief, and he has been trustworthily so informed and does believe.

DISTRICT ATTORNEY

Sworn to and subscribed before me, this the 30th day November, 1979.

CIRCUIT CLERK

My commission expires:

APPENDIX 4

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IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

FIRST JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VS. NO. 17,101

KENNETH WILLIAM WHEAT DEFENDANT

MOTION FOR MENTAL EXAMINATION

Comes now EARL STEGALL, Attorney of record for the the Defendant, who has reasonable cause to believe that the Defendant may be so mentally incompetent as to be unable to understand the proceedings against him or properly assist his attorney in the defense of his case, and respectfully moves this Honorable Court to enter an Order directing the Defendant to submit to a mental examination at the Coast Mental Health Center in Gulfport, Mississippi, by a competent psychologist as provided for in

Section 99-13-11 of the Mississippi Code of 1977, Annotated. Counsel for the Defendant further asks that the conclusion of said examination and evaluation of said Defendant herein, the examiner may furnish a complete record and report of his findings to the Court and furnish Counsel for the Defendant a full copy of same.

In support of the Motion, your Movant would respectfully show the following, to-wit:

I.

the Defendant herein was indicted and charged with the crime of CAPITAL MURDER, Two (2) Counts.

II.

That the Attorney of Record because of the statements made to him by the Defendant, and notes kept and made by the Defendant, and because of the past medical

history of the Defendant, is of the opinion that the Defendant is not competent to continue with the trial at the present time nor could he have been sane at the time he allegedly committed the offense of which he is charged.

III.

That the Defendant has refused to allow his attorney to file this motion in the name of the Defendant, and he has advised his attorney that he should not do so in his attorney's name. That the Court should require the Defendant to undergo a psychiatric examination as set out by statute.

Respectfully submitted,

BY: _____
EARL B. STEGALL
Of Counsel.

I hereby certify that
the above and foregoing
constitutes a true and
correct copy.
W. L. LEE
Circuit Clerk

FILED
MAR 8 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1131

In the Supreme Court of the United States

October Term, 1982

KENNETH WILLIAM WHEAT,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL ALLAIN, Attorney General
State of Mississippi
By: CATHERINE WALKER UNDERWOOD
Special Assistant Attorney General
(*Counsel of Record*)

and

By: MARVIN L. WHITE, JR.
Special Assistant Attorney General
Of Counsel
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680
Attorneys for Respondent

COCKLE LEGAL BRIEFS, INC., 209 Shelby Street, Kansas City, Mo. 64105, (816) 421-1303

QUESTION PRESENTED

I. WHERE PETITIONER ADMITS HE HAS NEVER PRESENTED THE CONSTITUTIONAL CLAIM CONCERNING THE DETERMINATION OF HIS COMPETENCY TO THE COURT BELOW THIS COURT IS WITHOUT JURISDICTION TO DECIDE THE ISSUE AND CERTIORARI SHOULD BE DENIED.

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No. 82-1131

In the Supreme Court of the United States

October Term, 1982

KENNETH WILLIAM WHEAT,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, State of Mississippi, respectfully prays that the Petition For Writ Of Certiorari to the Supreme Court of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as *Kenneth William Wheat v. State of Mississippi*, 420 So.2d 229 (Miss.1982). A copy of the opinion is before the Court as an Appendix 1 to the Petition For Writ Of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition For Writ Of Certiorari through the authority of 28 U.S.C. 1257(3). He has failed to do so.

STATEMENT OF THE CASE

Petitioner, Kenneth William Wheat, was indicted for the crime of capital murder by the Grand Jury of the Circuit Court of the First Judicial District of Harrison County, Mississippi during the September 1979 Term. The indictment grew out of the July 29, 1979 slaying of Joseph M. Mayer and his wife Teresa Hayes Mayer by petitioner.

Petitioner was tried during the January 1980 Term of the Harrison County Circuit Court. His bifurcated trial was conducted under the procedures set forth in Sections 99-19-101 to 107, Miss. Code Ann. (Supp.1977), and *Jackson v. State*, 337 So.2d 1242 (Miss.1976). At the conclusion of the first stage of the bifurcated trial the jury retired to consider the issue of guilt. After deliberation the jury returned a verdict of capital murder. The trial then continued into the second or sentencing stage. After hearing additional testimony and hearing arguments of counsel the jury retired to consider sentence. After deliberation the jury returned a sentence of death in the proper form.[1]

On automatic review to the Mississippi Supreme Court the conviction and sentence of death was affirmed by a unanimous court on October 6, 1982. *Wheat v. State*, 420 So.2d 229 (Miss.1982). No petition for rehearing was filed as petitioner had dismissed his retained counsel and refused to employ others until shortly before the December 8, 1982 execution date.

On November 26, 1982 this Court stayed petitioner's execution date pending filing, consideration and disposition of this petition.

---

1. Petitioner was tried during the December 1979 Term for the killing of Mrs. Mayer. He was convicted of capital murder and sentenced to life for that crime.

The facts, as reflected by the record, show that on July 28, 1979 Teresa Carol Hayes and Joseph M. Mayer were married in St. Thomas Moore's Church in Paducah, Kentucky. After the wedding and following a reception the newlyweds set off on their honeymoon. They spent their first wedded night in a Memphis, Tennessee motel. The following day Sunday, July 29, 1979 they set out for their final destination; Gulfport, Mississippi. In midafternoon the couple arrived in Gulfport and registered at the Worth Motor Lodge paying in advance for several days. The couple called their parents on the telephone and told them of their safe arrival.

The couple then went to dinner at the nearby, Friendship House Restaurant. After leaving the restaurant nothing more was seen of the couple until their bodies were discovered in a wooded area of rural Harrison County, Mississippi on July 31, 1979. Both had been shot in the head. Without more we would be at a total loss as to by whose hands this newlywed couple met their untimely demise.

However this dark night fate was on the side of right and justice. The perpetrator of this horrible crime had a mishap as he was attempting to flee the scene of his crime.

Appellant had taken his victims to a remote area and executed both. He had bound Joseph Mayer's hands and feet with pieces of his own clothing before shooting him at point blank range in the back of the head. After executing both Mayer and his wife he took their car. As he was driving back to the main road he hit a washed out place in the gravel road throwing the car into the ditch. He could not get it out alone. He went seeking help. He found what he needed at a trailer where Algie and Revina Netto lived with their daughter and Mrs. Netto's two adult sons, Gary Wayne and Eugene Walker. Appellant arrived at

the trailer sometime shortly after midnight. He knocked on the door and requested help and a glass of water. The two Walker boys went with appellant in Eugene's truck to the place where the car was stuck. After looking the situation over the three returned to the trailer to get a tractor. At this point Mr. Netto joined the group. The four of them returned to the car. After trying unsuccessfully to pull the car free with the tractor, Mr. Netto sent his stepsons back to the trailer to get shovels. They returned and dug the dirt from under the car. They were finally able to pull the car free with the tractor. When the car was on the road again it was discovered that one of the front tires had been blown out in the accident. The Walker boys changed the tire having to remove two chrome lug nut covers in the process. Appellant stood by and watched as Mr. Netto and the Walker boys did all the work to free the car. After getting the car in running condition again appellant followed Mr. Netto and his stepsons back to the trailer to get some more water and directions. He asked directions to Melva's Cafe and was directed there by Mr. Netto. In all appellant spent an hour and a half to two hours with the Netto/Walker family. During this period they noticed that appellant wore a sweet smelling aftershave lotion, that he had on slip-on tennis shoes and a light colored golf shirt and dark trousers. They also noticed his Vandyke beard and his receding hairline with his hair slicked back. They mentioned that he spoke with an accent not common to the area. They also noticed that the car he was dri ing was brown with a beige landau vinyl top bearing a Kentucky license plate. All four of the adult residents of the Netto/Walker home were able to positively identify appellant in open court.

A composite picture was prepared by Gary Wayne Walker and it was furnished to the news media. A deputy sheriff in Pearl River County recognized the picture and contacted the Harrison County authorities. Appellant was

arrested in Orlando, Florida on October 19, 1979, on another charge. He soon told the Florida authorities who he actually was and thereafter waived extradition and returned to Mississippi to stand trial.

REASONS FOR DENYING THE WRIT

Petitioner attempts to raise the only issue he presents here for the first time on this petition. He freely admits that he has not raised the "Constitutional implications" of the issue presented here in the section of his petition entitled "How The Federal Question Was Presented And Decided Below." (Petition at 28).

Under the rationale of *Webb v. Webb*, 451 U.S. 493 (1981) and *Cardinale v. Louisiana*, 394 U.S. 437 (1969), this Court lacks jurisdiction to decide an issue that has never been presented to the state courts or was not presented in a federal constitutional context to the state courts. This fact being admitted by petitioner, his attempt to invoke the jurisdiction of this Court fails.

Admittedly petitioner raised, on direct appeal, before the court below an issue concerning the lack of an examination by a psychiatrist before trial. However, this issue was not couched in federal constitutional terms nor did the argument have basis in fact.

Below, petitioner argued that the trial court refused to order a mental examination, this was shown to be false. *Wheat v. State*, 420 So.2d 229, 232-38. Three motions for mental examination were filed. The first motion filed by the petitioner was withdrawn at his insistence. 420 So.2d at 233. The second filed by the State was opposed by petitioner and after a hearing was denied. 420 So.2d at 233-35. The third, filed by petitioner, came during his trial for the capital murder of Teresa Mayer, between the guilt and sentence phases. The trial court granted this

motion and arranged for the examination. When taken before the psychiatrist petitioner refused to undergo the examination. 420 So.2d at 235-36.

If petitioner had succeeded in invoking the jurisdiction of this Court, which he has not, his argument would have been without merit. Petitioner's motion for examination was granted. He was taken to the psychiatrist for examination. He refused to speak or cooperate in any manner. Petitioner says he should have been forced to undergo the examination. The ridiculousness of the attempt to lay at the feet of the State petitioner's non-cooperation in what he had requested is beyond belief.

Petitioner has not presented any issue to this Court of which it has jurisdiction.

CONCLUSION

For the reasons stated above the Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi should be denied.

Respectfully submitted,

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